87-231

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERM OF COURT - OCTOBER, 1986

BOB STOVER,

Petitioner,

vs.

JOURNAL PUBLISHING CO., ALBUQUERQUE PUBLISHING CO., and THOMAS L. LANG

Respondents.

Petition for Writ of Certiorari from the New Mexico Supreme Court

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

A. Question Presented for Review:

Whether a newspaper publisher loses the protection of the fair report privilege where the publisher locates a witness, procures his testimony and submits the witness' affidavit in a court proceeding in which it is a party, and then republishes the witness' statements in the newspaper with the knowledge of their probable falsity.

B. Parties.

The caption contains the names of all parties.

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E. Opinions:

New Mexico Court of Appeals No. 8503, New Mexico Bar Bulletin Vol. 26, No. 29, P. 94, January 29, 1987; New Mexico Supreme Court No. 16,191, unpublished; withdrawn by Order dated January 28, 1987.

F. Jurisdictional Statement:

The order on which review is sought is the New Mexico Supreme Court's Order quashing the Writ of Certiorari and withdrawing its Opinion. The Order was dated January 28, 1987. Plaintiff-Petitioner Stover filed a timely Motion for Extension of Time to file a Petition for Rehearing which the Court granted by telephone communication, and filed a timely Petition for Rehearing on February 20, 1987. The petition was denied on June 26, 1987.

The Statutory provision believed to confer jurisdiction on the United States Court of Appeals is 28 U.S.C. 1257 (3).

The Federal constitutional questions prescribed were raised at all stages of the proceeding, including the Summary Judgment proceeding, appeal to the State Court of Appeals, and Petition for Certiorari to the New Mexico Supreme Court.

G. Constitutional Provisions and Statutes in the Case Involves:

a. Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

b. Constitution of the United States, Amendment II

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

c. Constitution of the United States, Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

d. Restatement (Second) of Torts, Section 611 and comment (c) thereto.

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and com-

plete or a fair abridgement of the occurrence reported.

Comment (c)

(a) person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not. Nor may he confer the privilege upon a third person, even a member of the communications media, by making the original statement under a collusive arrangement with that person for the purpose of conferring the privilege upon him.

H. Statement of the Case.

The present case arose when the Albuquerque Journal published a news article reporting a portion of the proceedings in a libel action by Attorney William Marchiondo against the Journal and other defendants. Marchiondo v. Brown, et al., Cause No. CV-6-75-02838, District Court, Second Judicial District, County of Bernalillo, New Mexico. In the course of the Marchiondo proceedings, these Defendants procured an affidavit from Jerome Sternlieb, a convicted felon, who was protected by the federal witness program. That affidavit contained statements purportedly connecting former Albuquerque Police Chief Bob Stover and former New Mexico Governor Jerry Apodaca to known organized crime figures. To protect these two individuals (non-parties to the litigation), the Court sealed the affidavit.

Mr. Apodaca, who was then a candidate for the Democratic nomination to the U. S. Senate, sought to reveal the affidavit's allegations pertinent to him in order to rebut them. The Marchiondo trial court held a hearing upon the Journal's unopposed motion to unseal the Affidavit. The Affidavit was unsealed. Bob Stover was not present nor represented at the hearing.

The following day, the Albuquerque Journal, who as Defendant in the Marchiondo case had procured, filed and moved to unseal the affidavit, published the affidavit's contents along with photographs of Bob Stover, Jerry Apodaca and two known organized crime figures, James Vincent Napoli, Sr. and James Vincent Napoli, Jr. and statements of Defendant Thomas Lang which he made in January of that year, three months prior to the unsealing, and not made at the hearing to unseal the Affidavit.

Bob Stover brought this defamation suit seeking damages on the basis of the filing the Sternlieb affidavit, and the newspaper publication of its contents. The complaint alleged that the Journal published the defamatory article with a high degree of awareness of the probable falsity of the statements about Stover. Stover was, at the time, a candidate for the office of County Sheriff.

Defendants moved for summary judgment contending that the newspaper article reporting the affidavit was protected under the fair report privilege. For the purpose of Defendants' motion only, the trial court assumed that the Sternlieb statements, as related to Stover, were defamatory and that Defendants had "a high awareness of their probable falsity."

Following a hearing, the Court granted partial summary judgment in favor of the defendants, holding that the initial publication of the affidavit by filing it in court was absolutely privileged and that the statements of Defendant Lang in the article, and the placement of the photograph of Stover in the article were not susceptible to defamatory meaning and were constitutionally protected statements of opinion. That portion of the summary judgment order is not at issue here.

The court denied summary judgment as to the publication of the news article. The parties conceded Stover was a public figure within the meaning of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). While ruling as a matter of law that the article was a fair and accurate report of the hearing to unseal the Affidavit, the trial court held that the fair report privilege "does not apply

here due to comment (c) of Section 611 Restatement, Torts 2d," which provides that a person cannot confer the fair report privilege upon himself when he "made" the original defamatory statement and then publish to others that which he stated.

The New Mexico Court of Appeals reversed. The Opinion of the Court is contained in Appendix A. The New Mexico Supreme Court granted Petitioner Stover's Petition for Certiorari and reversed the Court of Appeals' decision. Defendants-Respondents then filed a Motion for Rehearing. The New Mexico Supreme Court granted the motion and quashed its Writ of Certiorari as improvidently granted. The New Mexico Supreme Court's Opinion is included in Appendix B.

I. Argument.

This case presents an important public question concerning the balance to be struck between the Constitutional protections afforded a free press by the First Amendment and the individual's right to be free from defamatory statements. In reversing the District Court and ruling that summary judgment is appropriate in this case, the New Mexico Court of Appeals tipped the scales in favor of the media by creating an absolute privilege, and left the individual with no redress for violation of his constitutionally protected rights.

The New Mexico Supreme Court, in its original opinion, recognized the error in the Court of Appeals' opinion. It is this opinion, withdrawn on rehearing, which correctly answers the question whether the fair report privilege is absolute, or qualified and so lost if the report is made with malice. The Court decided that the comment (c) exception to Restatement (Second) Torts Section 611 should be applied to the facts of this case.

This Court has recognized the careful balance which states must strike between the individual's rights and press privileges. The Court has emphasized that it is truly a balance, and that the rights of the individual

to judicial redress of libelous utterances are as compelling as the public's interest in an uninhibited press. Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976). It has also found damages liability for publishing knowing or reckless falsehoods is consistent with the First Amendment. Herbert v. Lando, 441 U.S. 153, 171 (1979).

In this case, the New Mexico Court of Appeals has, in effect, created an absolute privilege for a newspaper to produce in-court statements with reckless disregard for their truth, and then republish the court proceedings as long as the newspaper did not file the suit itself. Such a decision is in conflict with this Court's development of the law of libel.

This Court has long recognized the limits of the press' First Amendment privileges. Even where a privilege exists, when malice is shown, the First Amendment's protections cease.

> We conclude then that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribune or authority, although such court, legislative body or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, libelous in its character, and actionable, and will subject the author and publisher thereof to all consequences of libel.

White v. Nicholls, 3 How. 266, 286 (1845) quoted in Herbert v. Lando, 441 U.S. 153 (1979) at n. 10, p. 163-164.

In Herbert, the Court rejected the contention that an absolute evidentiary privilege was required for the editorial process in order to allow the press to carry out its function without impermissible constitutional burdens, including a chilling effect on the editorial process. "But if the claimed inhibition flows from fear of damages liability for publishing knowing or reckless falsehoods, those

effects are precisely what the New York Times and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. '(T) here is no constitutional value in false statements of fact.' " Herbert v. Lando, 441 U.S. at 171, citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

In Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976), the United States Supreme Court considered the balance between "the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." In Firestone, Time Magazine published an article quoting a trial judge as stating that there was "enough testimony of extramarital adventures on both sides (of the Firestone divorce) . . . 'to make Dr. Freud's hair curl.' " Id., at 452. Ms. Firestone sued for libel. Time advocated a holding by the Supreme Court that as the report of a judicial proceeding, the article deserved the protection of the "actual malice" standard in New York Times Co. v. Sullivan. Id., at 453. The Court rejected Time's claim for automatic extension of the New York Times actual malice standard to all reports of judicial proceedings. Id., at 455. Time argued that the "information concerning proceedings in our Nation's courts may have such importance to all citizens as to justify extending special First Amendment protection to the press when reporting on such events." Id.

The Court rejected such a subject matter classification, specifically noting that "no such blanket privilege for reports of judicial proceedings is to be found in the Constitution." Id. at 456. Similarly, the Journal Defendants are seeking to extend New York Times beyond the malice standard enunciated in that case to absolute immunity for reporting on judicial proceedings, regardless of knowledge of truth or falsity. The concept of malice defined the parameters of the privilege to report on public figures in New York Times. See, Firestone, at 453. The Journal Defendants now seek to eliminate these standards, based on the same type of subject matter classification rejected by the Supreme Court in Firestone. Id., at 455. Rather than adopt such a subject

matter classification, the Supreme Court reaffirmed the private/public distinction, which permits a public figure to recover if he can show malice. The Journal Defendants' rule of immunity regardless of knowledge of falsehood when reporting on all judicial proceedings directly contradicts the Supreme Court in Firestone, which found that a private person could recover for libel in the reporting of judicial proceedings without even the necessity of showing malice. Further, the absolute immunity rule regardless of malice proposed by the Journal, based solely on the subject matter classification of "judicial proceedings," seriously undermines the private/public distinction the Supreme Court reaffirmed less than a decade ago in Firestone. The Journal Defendants seek to restructure the Supreme Court's theory to base distinctions in privilege entirely on subject matter, a rule the Court has specifically rejected, stating such a distinction "might achieve results directly at odds with the constitutional balance intended." Id., at 456.

The New Mexico Court of Appeals ruled that the Defendants were insulated from liability for defaming Bob Stover by the fair report privilege, even though they themselves caused the defamatory statements to become part of a judicial proceeding and then reported them to others. The fair report privilege is qualified and it offers no protection to an individual who "makes" the original defamatory publication and then reports it to others. Restatement (Second) of Torts, Section 611, comment (c). The Court of Appeals' decision too narrowly reads this exception to the fair report privilege. As a result, the Court's ruling frustrates the very public policy upon which the privilege stands, and it undermines an equally compelling policy consideration of an individual's freedom from defamation and public ridicule.

The Court concluded first that because Sternlieb actually signed the affidavit, the Defendants did not make the original defamatory statements; thus, the court determined the exception to the fair report privilege did not apply. This is an overly restrictive interpretation of the exception and ignores significant factors unique to this case. It should be noted that the trial judge ordered dis-

covery cease and therefore all evidence tending to establish or disprove "collusive arrangement" as contemplated by comment (c), Section 611, has not been developed or explored by the parties.

Here, the Defendant or their agents located Sternlieb, procured his statements, composed the affidavit for his signature, filed it in court, and moved to have it unsealed. Neither Sternlieb nor his affidavit were used by the media defendant in its litigation, although he was called by Marchiondo, that the trial judge disallowed costs pertaining to the affidavit and deposition of Sternlieb by the Journal. In effect, the Defendants were solely responsible for the affidavit's creation and making it part of the judicial proceedings. The picayune difference between making a statement in court known to be probably false and submitting a witness' affidavit in support of one's case knowing that it is probably false is too narrow to limit the fair report privilege in one instance and not in another.

The distinction, too, is incongruent with the plain meaning of the verb "to make" which includes "to cause to exist, occur, or appear." Webster's New Collegiate Dictionary (1980). Clearly, the Defendants themselves caused the defamatory statements to exist, to occur, and to appear in the record of an official proceeding. As the New Mexico Supreme Court recognized in its opinion, the relationship between Sternlieb and the Journal's agents in the preparation and editing of the affidavit indicate that material issues of fact remain.

The Court of Appeals concluded second that the Defendants did not abuse the fair report privilege and therefore they were entitled to its protection. The Court's discussion implied that it would recognize only one sort of abuse of the privilege in order to evoke the self-reported exception: the case where a person initiates a public proceeding for the very purpose of defaming a certain individual. The status of the media as a defendant rather than a plaintiff should not diminish the obligations of the media as such or as a litigant. Malicious misuse of governmental process is only one and not the sole instance

of abuse which would strip a person of the privilege's protections.

The Defendants here clearly abused the privilege. They enter Sternlieb's affidavit into a court proceeding in support of their own subjective cause, even when they were aware of its probable falsity and defamatory character. Later, they donned the role of objective reporter, published the affidavit's contents, thereby lending credibility to the incredible allegations. The very overlap and confusion between the Defendants' litigant and reporter roles present an abusive factor ignored by the appellate court.

In dicta, the appellate court determined that application of the self-reported exception in this case would undermine the privilege's purpose of insuring open reporting of official conduct. The court's conclusion is erroneous. Imposing liability on the Defendants for defaming Bob Stover will not lead to garbled or skewed news reporting where a litigant/newspaper would be forced to ignore its in-court statements when issuing reports on the proceedings. Nor will it impose an undue burden on media Defendants to take special measures to insure the accuracy of their news stories. If the Journal seeks parity in reporting a judicial proceeding, it must have equal innocence with the other reporting media.

Removal of the privilege means only that a newspaper would be liable for republication of any of its in-court defamatory statements when the criteria and facts of the instant case are applicable. Clearly, the rule a newspaper follows in deciding whether to publish its own witness' statements is the very same rule that would control everyday publishing decisions regarding public figures or matter of public interest. If the article contains untruths or is published with reckless disregard for the truth, it should not be published.

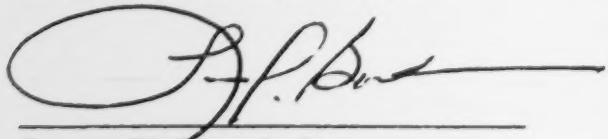
In further support of its decision, the appellate court concluded that application of the exception would (1) require an unsound intermingling of newsgathering and litigating responsibilities, and (2) bring about a "strange

result" where Sternlieb would be protected by the privilege and the Defendants would not. First, it is the appellate court's own decision that permits an unacceptable coupling of a newspaper's role as Defendant and as reporter. Second, the fact that Sternlieb would not be held liable for defamation while the Defendants would may be ironic, but certainly does not constitute a persuasive reason to insulate the Defendants from liability. Both Sternlieb and the Defendants made the in-court defamatory statements. Only the Defendants republished them. Thus, the exception should apply to them.

J. Conclusion.

In conclusion, this case presents a constitutional question of public concern regarding the balance between the rights of the public to a free and uninhibited press and the rights of the individual to be free from defamatory statements. The decision of the New Mexico Court of Appeals is in conflict with United States Supreme Court precedent on the issue of absolute privileges of the press, and renders it impossible for the individual to vindicate his constitutionally protected rights.

THE BRANCH LAW FIRM



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BOB STOVER,

Plaintiff-Appellee,

vs. **No. 8503**

JOURNAL PUBLISHING COMPANY,
ALBUQUERQUE PUBLISHING COMPANY,
and THOMPSON H. LANG,

Defendants-Appellants.

APPEAL FROM
THE DISTRICT COURT OF BERNALILLO COUNTY

Rebecca Sitterly, Judge

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OPINION

BIVINS, Judge

This appeal presents the question whether a publisher loses the protection of the "fair report privilege" when statements reported fairly and accurately in a newspaper article originate from a witness located by the publisher in litigation involving the publisher. The parties appear to agree that this precise question has not heretofore been decided in New Mexico or by any other jurisdiction. Based on our own research, we agree, at least in terms of applying a self-reported statement exception to a member of the media who is also a party to a lawsuit.

The present action by plaintiff Bob Stover against Journal Publishing Company, Albuquerque Publishing Company, and Thompson H. Lang for defamation grew out of an earlier lawsuit brought by attorney William Marchiondo against one or more of the defendants in this case. As part of the pretrial discovery in the Marchiondo case, the *Journal* located several federally-protected witnesses, one of whom was Jerome Sternlieb, a self-acknowledged former underworld crime participant and a convicted felon. Because federally-protected witnesses are not available for interviews, the trial court ordered the *Journal* to provide Marchiondo with a pre-deposition affidavit of Sternlieb, disclosing the content of his expected testimony.

In the relevant part of his affidavit, Sternlieb recounted a visit he made to Albuquerque accompanied by James Vincent Napoli, Jr., "Lefty." In his affidavit, Sternlieb identified "Lefty" as the son of an underworld crime figure, James Vincent Napoli, Sr. According to Sternlieb:

> 8. On the morning after our arrival Lefty called an individual by the name of Bob Stover whom Lefty described as the Albuquerque Police Chief. Later this individual came to our room, introduced himself, talked briefly, including asking Lefty how Lefty's father was doing, and offered to drive us around Albuquerque in his automobile.

> 9. Bob Stover in fact drove us around Albuquerque that day first driving us past a shopping center which he stated was one of the properties in which James Vincent Napoli, Sr. had an interest, together with William C. Marchiondo and Governor Jerry Apodaca. This shopping center was not quite completed at this time. Stover stated that Governor Jerry Apodaca's wife and James Vincent Napoli's wife were going to operate a boutique type store in the shopping center.

On January 12, 1982, the *Journal* filed the Sternlieb affidavit which the trial court ordered sealed. The trial court, however, permitted Marchiondo's lawyer to provide a copy of the affidavit to Stover and to the former governor because their names were mentioned in the affidavit. At the time, Stover was a candidate for Sheriff of Bernalillo County, and Apodaca was a candidate for the United States Senate.

Apodaca's attorney called Judge Traub on April 12, 1982 to advise the court that Apodaca intended to call a press conference on April 14, 1982 to release the Sternlieb affidavit and to rebut its contents as applied to him. The trial court scheduled a hearing to decide whether the affidavit should be unsealed. Stover did not attend the hearing, and it is disputed whether he received notice of the hearing.

The *Journal* filed an unopposed motion to unseal the affidavit. At the hearing, Marchiondo's lawyer, at Stover's request, filed an affidavit by Stover denying the Sternlieb allegations. Prior to the unsealing of the Sternlieb affidavit, Stover was interviewed by KOAT-TV concerning Sternlieb's claims. On that evening, April 13, 1982, KOAT-TV, KOB-TV and KGGM-TV each carried accounts of the Sternlieb affidavit as well as Stover's rebuttal.

The following day, April 14, 1982, the *Journal* published an article concerning the affidavit and Stover's denials. The article appeared on the front page of the newspaper. Appearing next to the article were pictures of Stover, Napoli, Sr., Napoli, Jr., and Apodaca. The article recounted the allegations of the affidavit as well as the rebuttal contained in Stover's affidavit.

In his amended complaint for defamation, Stover sought damages on the bases of the filing of the Sternlieb affidavit and also the publication of the April 14th article. Stover contends that the *Journal* published the article with "a high degree of awareness of the (affidavit's) probable falsity." Stover's second cause of action was against defendant Lang. This cause of action primarily concerned Lang's statements, which appeared in the newspaper article.

Defendants moved for summary judgment on the basis that: (1) the filing of the Sternlieb affidavit was absolutely privileged; (2) the newspaper article reporting the affidavit was protected under the fair report privilege; and (3) defendant Lang's statements in the article were not susceptible of a defamatory meaning, were constitutionally protected opinions, and were true. For the purposes of defendants' motion only, the trial court assumed that the Sternlieb statements, as related to Stover, were defamatory and that defendants had "a high awareness of their probable falsity."

Following a hearing, the trial judge, Judge Sitterly, ruled that the affidavit was generated in a judicial proceeding, was reasonably related to that proceeding, and was, therefore, absolutely privileged. The trial court also ruled that the statements of defendant Lang and the placement of the pictures were not susceptible of defamatory meanings. As a result of these holdings, the trial court granted partial summary judgment in favor of all defendants, regarding the filing of the affidavit, the statements of Lang, and the positioning of the pictures in the news article.

The trial court, however, denied summary judgment as to the publication of the April 14, 1982 news article. While ruling, as a matter of law, that the article was fair and accurate, the trial court held that the fair report privilege "does not apply here due to comment (c) of Section 611, Restatement, Torts 2d," which provides in applicable part, "A person cannot confer this [fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated."

After skillfully posturing the issues, the trial court certified this question for interlocutory appeal, pursuant to NMSA 1978, Section 39-3-4,

as involving a controlling question of law as to which there is substantial ground for the difference of opinion, and that a resolution would materially advance the ultimate termination of this litigation. In fact, the trial court indicated that a definitive decision "will entirely dispose of this case in light of the court's other rulings."

This court agreed to accept defendants' application for interlocutory appeal to consider the question. Having done so, we now hold that even if comment (c) to Section 611 of the Restatement (Second) were adopted, it has no application to the facts of this case. Accordingly, we hold that the *Journal* did not lose the protection of the fair report privilege when it published an article which fairly and accurately reported the statements of a witness whom the *Journal* had located in the course of preparing for litigation in which the *Journal* was a defendant. For a clearer understanding of the question, we first discuss the fair report privilege. We then shall address the specific question raised.

1. ***The fair report privilege.***

The essence of the fair report privilege is that no liability will attach for the republication of the defamatory statements so long as the republication is a fair and accurate report of an official or public proceeding. The Restatement (Second) of Torts § 611 (1977) articulates the privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

New Mexico first recognized the fair report privilege in 1919 in *Henderson v. Dreyfus,* where the supreme court quoted with approval that '"[e]very impartial and accurate report of any proceeding in a public law court is privileged."' 26 N.M. 541, 566, 191 P. 442, 452 (1919), *quoting from* Newell on Slander and Libel § 646 (3d ed.). *See also Del Rico Co. v. New Mexican, Inc.,* 56 N.M. 538, 246 P.2d 206 (1952), *overruled on other grounds,* 98 N.M. 394, 404, 649 P.2d 462, 472 (1982); *Rockafellow v. New Mexico State Tribune Co.,* 74 N.M. 652, 397 P.2d 303 (1964); *Hubbard v. Journal Publishing Co.,* 69 N.M. 473, 368 P.2d 147 (1962).

Three reasons have been advanced for subordinating the defamed person's interest in his reputation to the interests of the public. Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report,* 54 N.Y.U.L. Rev. 469, 483 (1979). The first is the agency theory. The rationale of the agency theory is that the reporter serves as the agent of the citizen who was absent at the public proceeding. The New Mexico Supreme Court recognized this function in *Del Rico Co. v. New Mexican, Inc.,* acknowledging that '[o]nly a small fraction of the population . . . would be able to attend meetings of this kind personally. Consequently, it was but natural that they should look to the press for information concerning them." 56 N.M. at 545, 246 P.2d at 211.

The second theory involves the public's supervisory function. This theory embodies recognition of the public's duty to scrutinize official conduct and to determine whether public policies and institutions serve public needs. Sowle, *supra* at 484-86; *see also Hughes v. Washington Daily News Co.,* 193 F.2d 922 (D.D.C.1952).

Finally, the fair report privilege is justified on the basis of its information function. The need of a self-governing society to be apprised fully of public concerns and controversies has been deemed to outweigh an individual's reputational concerns. Sowle, *supra* at 487.

Because the fair report privilege has the public interest as its foundation, the truth or falsity of statements made in the proceedings and reported to the public does not merit inquiry. *Ricci v. Venture Magazine, Inc.,* 574 F.Supp. 1563 (D.Mass.1983). The fact that statements made in the proceedings were false will not upset the privilege, not even when the reporter knew that the statements were false and reported them anyway. *Id.;* Restatement, *supra,* § 611, comment (a). There is a two-pronged justification for the lack of relevance concerning the truth or falsity of the statements and the reporter's knowledge thereof. First, the public is best served by exposure to the actual content of the official proceedings, regardless of whether all of the statements were true or false. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Even if the reporter knows of the falsity of a statement, he is not restrained from reporting the information. The public has a right to access to a full account of a proceeding, not only to satisfy its informational concerns but

to fulfill its supervisory duties. *Bell v. Associated Press,* 584 F.Supp. 128 (D.D.C.1984). Second, to require a reporter to ascertain the truth or falsity of every statement uttered or published in an official or public proceeding would impose an intolerable burden on the press. *See,* 52 A.L.I. Proc. 186 (1975). If the press faced possible civil liability for every falsity published, coverage would be reduced and, as a result, the public's needs would suffer.

Thus, the fair report privilege protects against liability "even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false." Restatement, *supra,* § 611, comment (a).

Abuse of the privilege takes place, however, when the publisher does not give a fair and accurate report of the proceeding. As stated in *Henderson v. Dreyfus:*

> While a person may publish a correct account of the proceedings in a court of justice, yet, if he discolors or garbles the proceedings, or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous, and not privileged. 26 N.M. at 566, 191 P. at 452 (citation omitted).

The trial court held as a matter of law that the *Journal's* April 14, 1982 news article fairly and accurately reported the contents of the Sternlieb affidavit, a component of the judicial proceedings in the Marchiondo case. Therefore, unless the privilege is unavailable to defendants, as Stover claims, the privilege applies and insulates defendants from liability. Stover relies on comment (c) to Section 611 of the Restatement (Second) to support his claim. We now turn our attention to the pivotal question.

2. ***Whether defendants may exercise the privilege.***

Comment (c) to Section 611 of the Restatement (Second) provides in pertinent part: "A person cannot confer this [fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated." Restatement, *supra,* § 611, comment (c).

The parties sharply disagree as to whether comment (c), which purports to create a self-reported statement exception to the fair report privilege, was ever presented to or voted on by the American Law Institute (A.L.I.), publishers of the Restatement. We need not enter this debate or attempt to resolve the dispute, if, in fact, one exists. For the purposes of this appeal, we assume that the self-reported statement exception was adopted, and further assume that it expresses the common law. We make these assumptions because even if the exception represents the law, it does not apply, in any event, to the facts of the present case.

The self-reported statement exception does not apply for at least two reasons. First, the original defamatory publication was made by Sternlieb, not the *Journal* defendants. Stover attempts to overcome this distinction by arguing that John S. Donahue, an investigator for the *Journal* and an original defendant in this action, met with Sternlieb and provided Sternlieb false information which was incorporated in the affidavit. This argument fails for want of factual support. The record reflects that Sternlieb made substantially the same allegations to the Federal Bureau of Investigation more than a year before Donahue's alleged meeting with him. Moreover, Stover's original claim of conspiracy, based in part on allegations that defendants joined with Sternlieb to create the affidavit, was dismissed with prejudice.

Second, the exception, by its own terms, was obviously intended to prevent the abuse of the fair report privilege. For example, a person might bring a suit or hold a public meeting not with the intention of pursuing the purported objective but to cause harm to another, by pleading or announcing defamatory matter and then using the protective shield of the fair report privilege to republish the defamatory matter to the world or to a targeted audience.

Although decided on the basis of a New York statute, not comment (c), the case of *Williams v. Williams,* 23 N.Y.2d 592, 298 N.Y.S.2d 473, 246 N.E.2d 333 (1969), is helpful in understanding the exception. In that case, the defendants, through their corporation, had initiated an action against plaintiff alleging that plaintiff had conspired with others to misappropriate and to misuse the company's trade secrets and assets. Defendant then circulated copies of the complaint to members of plaintiff's trade. Plaintiff brought suit against defendants claiming, among

other things, that the action against him was totally without basis in fact, and was begun for the purpose of ruining his business reputation. Defendants asserted the fair report privilege as a defense and asked that plaintiff's complaint be dismissed. *Williams* affirmed denial of that motion, holding that the fair report privilege, as found in Section 74 of the New York Civil Rights Law, Consol.Laws, c.6, was never intended to permit a person maliciously to institute a judicial proceeding, alleging false and defamatory charges, then to circulate a press release or other communication based thereon, and, ultimately to escape liability by invoking the fair report privilege statute. Thus, the court grafted on to the fair report privilege statute, which otherwise provided an absolute privilege as long as the publication fairly and truly reported the judicial proceeding, an implied exception to meet the circumstances of that case.

In the case before us, the *Journal* defendants did not instigate the judicial proceedings in which the Sternlieb affidavit was filed; they were unwilling defendants. Further, the unrefuted evidence before us reflects that the *Journal's* newsgathering activities were executed completely independent of and separate from its defense of the Marchiondo case. Thus, the exception to the fair report privilege, as presented in comment (c), has no application to the facts of this case. The decision of whether that exception should be adopted at all will have to await a proper case.

Defendants argue, and we agree, that to apply the comment (c) exception to this case would undermine an important purpose of the fair report privilege, which is to allow the report of that which the public could have independently heard or read. The Sternlieb affidavit was unsealed and, therefore, available for public examination. As noted, it had already been reported by several television stations before the *Journal* published its article.

We also agree that to apply the exception under the circumstances of this case could lead to "inaccurate and unintelligible reporting." To relegate the *Journal* to publishing only rebuttal testimony, while denying it the right to report fairly and accurately the contents of the testimony in question, would result in skewed, garbled reporting, defeating the purpose of the privilege.

Stover argues that the *Journal* defendants lost their agency roles, that

is, to act as the agents of the citizen who was absent at the proceeding. Because defendants were parties to the *Marchiondo* case, Stover would place a burden on them to ascertain the truth of witnesses' statements before republishing them. Quite aside from the fact that the *Journal* defendants were unwilling defendants to that case and such burden would not be imposed on other members of the press, we reject as unsound a requirement that the media mix its responsibilties as an independent newsgatherer with its role in the defense of litigation in which it may be involved. To do so would not only be administratively impractical but likely would lead to violations of the ethical standards of the newspaper and legal professions.

Finally, it would bring about a strange result, indeed, to accord Sternlieb absolute immunity for making defamatory statements under the judicial privilege, *see Stryker v. Barbers Super Markets, Inc.*, 81 N.M. 44, 462 P.2d 629 (Ct.App.1969), while making defendants liable for having fairly and accurately reported the statements. The fair report privilege protects against such a result.

The parties have also argued the certified question on the basis of the First Amendment's guarantees of freedom of speech and freedom of the press. Because the question can be answered under the common law, we need not reach the constitutional issue. Courts will not decide constitutional questions unless necessary to the disposition of the case. *State v. Campbell*, 75 N.M. 86, 400 P.2d 956 (1965); *In re Bunnell*, 100 N.M. 242, 668 P.2d 1119 (Ct.App.1983).

The case is remanded to district court for further proceedings in accordance with this opinion. Defendants shall recover costs of appeal.

IT IS SO ORDERED.

WILLIAM W. BIVINS, Judge

WE CONCUR:

THOMAS A. DONNELLY, Chief Judge

JOE W. WOOD, Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BOB STOVER,

Petitioner,

v s No. 16,191

JOURNAL PUBLISHING CO., ALBUQUERQUE PUBLISHING CO. and THOMPSON H. LANG,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI

Rebecca Sitterly, District Judge

Turner W. Branch
Albuquerque, New Mexico

A. J. Ferrara
Albuquerque, New Mexico

Joseph P. Paone for Petitioner
Albuquerque, New Mexico

Rodey, Dickason, Sloan, Akin & Robb
William S. Dixon
Jill E. Adams
Albuquerque, New Mexico

Pryor, Cashman, Sherman & Flynn for Respondents
Nathaniel H. Akerman
New York, New York

OPINION

STOWERS, Justice.

We granted a writ of certiorari in this case to consider whether this Court should adopt as the law of New Mexico the Restatement (Second) of Torts Section 611 (1977) formulation of the fair report privilege for publication of defamatory matter in a report of a judicial proceeding, including the exceptions to the privilege defined in comment c of that Restatement section. Although Restatement (Second) of Torts Section 611 describes a privilege for the publication of fair and accurate reports of official proceedings and public meetings on matters of public concern, we here consider only the applicability of that section to reports of judicial proceedings. Our inquiry focuses upon the comment c exceptions that in some circumstances deny the privilege to defendants who publish such reports after participating in the making of the original defamatory statement.

The peculiar multiplicity of roles played by the defendants here make this a case of first impression not only in New Mexico but in any American jurisdiction. The Albuquerque *Journal,* in the course of defending another judicial proceeding, filed a witness's affidavit and then published a news article reporting its contents. Plaintiff-petitioner Bob Stover (Stover), the subject of the allegedly defamatory affidavit testimony and news article, brought this suit against the *Journal* and other corporate and individual defendants involved in the publication of the article.

Invoking the fair report privilege, the *Journal* defendants moved for summary judgment. The district court denied the motion on the ground that the comment c exception to Restatement (Second) of Torts Section 611 barred the defendants from invoking the privilege. On interlocutory appeal, the Court of Appeals held that the comment c exception did not apply to the facts of this case and reversed the district court's order.

After reviewing our law of defamation, we adopt Restatement (Second) of Torts Section 611 and comment c thereto as the law governing this case. We agree with Stover that the Court of Appeals read too narrowly the comment c exceptions to the fair report privilege. Therefore we reverse the Court of Appeals' decision and remand to the district

court for further proceedings.

The black letter of Restatement (Second) of Torts Section 611 states:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Because the fair report privilege is based upon the public's interest in receiving information about public proceedings, the privilege generally exists even when the publisher believes or knows the statements reported are false. Restatement (Second) of Torts § 611 comment a (1977). Comment c, however, provides that:

> [a] person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not. Nor may he confer the privilege upon a third person, even a member of the communications media, by making the original statement under a collusive arrangement with that person for the purpose of conferring the privilege upon him.

Restatement (Second) of Torts § 611 comment c (1977).

On April 14, 1982, the Albuquerque *Journal* published a news article reporting a portion of the proceedings in the case of *Marchiondo v. Brown,* No. CV-75-02838 (Bernalillo County Dist. Ct. filed June 13, 1975), a libel action brought by attorney William Marchiondo against the *Journal* and other defendants. During a hearing the day before, the district court had unsealed an affidavit procured and filed upon court order by the *Journal* defendants in accordance with the court's procedure for obtaining a testimony of federally protected witnesses. In the affidavit Jerome Sternlieb, a convicted felon, connected Stover, former Governor Jerry Apodaca, and Marchiondo to organized crime figures. The news article reported these accusations and reported that during the hearing Stover had filed an affidavit denying Sternlieb's statements.

Stover, then a candidate for the office of Bernalillo County sheriff, subsequently filed the present libel action. His complaint alleged that, in the course of the *Marchiondo* litigation, the *Journal* and its agents conspired and combined to create the Sternlieb affidavit and to disseminate defamatory material about Stover not reasonably related to the issues in that case. It further alleged that the *Journal* published the defamatory news article with a high degree of awareness of the probable falsity of the statements about Stover. After extensive discovery, the *Journal* defendants moved for summary judgment on the ground that no genuine issue of material fact existed as to whether the publication was privileged.

Following a hearing, the district court granted partial summary judgment in favor of the defendants, holding that the initial publication of the Sternlieb affidavit by filing in court was absolutely privileged and that statements of defendant Lang cited in the article and the placement of Stover's photograph in the article were not susceptible of a defamatory meaning and were constitutionally protected statements of opinion. These determinations are not in issue here.

The district court, however, denied the defendants' motion for summary judgment as to the newspaper publication of portions of the Sternlieb affidavit. The parties had conceded that Stover was a "public figure" within the meaning of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and therefore that Stover needed to prove that the defendants had acted with "actual malice." For purposes of determining the summary judgment motion, the district court first assumed that the statements cited from the affidavit were defamatory and that the defendants had reported them with a high awareness of their probable falsity, that is, that the defendants had published defamatory material with "actual malice." The district court then ruled, as a matter of law, that the news article was a fair and accurate report of courtroom proceedings in the *Marchiondo* case.

Such fair and accurate reports generally are protected from liability for defamation by the fair report privilege. The district court held that the defendants here were barred from invoking the privilege, however, because, according to Restatement (Second) Torts Section 611 comment c, "'a person cannot confer this privilege upon himself by making the original defamatory publication [i.e., filing of the affidavit] himself and

then reporting [i.e., publishing the article] to other people what he has [sic] stated.'" The district court then certified to the Court of Appeals for interlocutory appeal its decision concerning the availability of the fair report privilege in the circumstances of this case.

The Court of Appeals did not rule whether Restatement (Second) of Torts Section 611 and comment c represent the law of New Mexico, but assumed that they did. Reversing the district court's conclusion, the Court of Appeals held that the comment c exception did not apply to the facts of this case for two reasons. First, the *Journal* defendants did not "make" the original defamatory publication; Sternlieb "made" it. Second, the exception was intended to prevent abuse of the fair report privilege by plaintiffs maliciously instigating judicial proceedings in order to republish defamatory pleadings, not by involuntary defendants like the *Journal*. Therefore, the Court of Appeals held, the *Journal* defendants did not lose the protection of the fair report privilege. We do not agree.

Our constitution provides that "[e] very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right . . ." N.M. Const. art. II, § 17. We long ago recognized that, as a general rule, "'[e]very impartial and accurate report of any proceeding in a public law court is privileged.'" *Henderson v. Dreyfus*, 26 N.M. 541, 566, 191 P. 442, 452 (1919) (quoting M. Newell, *The Law of Libel and Slander* § 646 (3d ed. 1914). Although the question whether the fair report privilege is absolute, or qualified and lost if the report is made maliciously, has been raised before this Court, until today we have not needed to answer it. *See Del Rico Co. v. New Mexican, Inc.*, 56 N.M. 538, 552, 246 P.2d 206, 215 (1952), *overruled on other grounds, Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982); *Hubbard v. Journal Publishing Co.*, 69 N.M. 473, 475, 368 P.2d 147, 148 (1962)(citing W.Prosser, *The Law of Torts* § 95 (2d ed. 1955) and paraphrasing *id.* at 625)(right or privacy case; article published for proper purpose); *see also Blount v. T D Publishing Co.*, 77 N.M. 384, 388-89, 423 P.2d 421, 424 (1966)(right of privacy case; article newsworthy); *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 166-67, 538 P.2d 804, 808-09 (Ct.App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975)(right of privacy case; article newsworthy).

The United State Supreme Court repeatedly has balanced the public's interest in an uninhibited press, protected by the first amendment to the United States Constitution, against the public's need for judicial redress of libelous utterances. *See Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976); *see also Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340-47 (1974). It has held that the public interest in accurate reports of judicial proceedings is substantially protected by the prohibition of sanctions for the publication of truthful information contained in official court reports open to the public. *Firestone,* 424 U.S. at 457 (citing *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975). Recognizing that "there is no constitutional value in false statements of fact," *Gertz,* 418 U.S. at 340, it has refused to extend a privilege to inaccurate and defamatory reports of facts aired in the course of judicial proceedings, *Firestone,* 424 U.S. at 455-57.

Neither the United States Supreme Court nor his Court has decided whether the balance of competing interests requires the extension of an absolute privilege to accurate reports of defamatory statements of fact made in the course of judicial proceedings. Our Court of Appeals has recognized that false statements of fact have no constitutional value, *Ammerman v. Hubbard Broadcasting, Inc.,* 91 N.M. 250, 253, 572 P.2d 1258, 1261 (Ct. App.), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied,* 436 U.S. 906 (1978)(quoting *Gertz,* 418 U.S. at 340), and that the constitutional guarantees of freedom of speech and of the press "'can tolerate sanctions against calculated falsehood without significant impairment of their essential function.'" *McNutt,* 88 N.M. at 168, 538 P.2d at 810 (quoting *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967)). No New Mexico decision has suggested that absolute immunity without regard to purpose or reasonableness of conduct should be extended to the reporting of judicial proceedings. *See Neece v. Kantu,* 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct.App.), *cert. denied sub nom. Ritschel v. Neece,* 84 N.M. 696, 507 P.2d 443 (1973); *Stryker v. Barbers Super Markets, Inc.,* 81 N.M. 44, 46, 462 P.2d 629, 631 (Ct.App.1969). We therefore hold that New Mexico law recognizes not an absolute but a qualified privilege for fair and accurate reports of judicial proceedings.

This Court must explicate our common law of defamation and must determine what constitutes an abuse of the right of free speech guaranteed by our constitution. *See* N.M. Const. art. II, § 17. New Mexico courts frequently have relied upon the Restatement (Second) of

Torts in deciding defamation cases. *See, e.g., Penny v. Sherman,* 101 N.M. 517, 520, 684 P.2d 1182, 1185 (Ct.App.), *cert. denied,* 101 N.M. 555, 685 P.2d 963 (1984)(Section 586: privilege for judicial proceedings); *Coronado Credit Union v. KOAT Television, Inc.,* 99 N.M. 233, 237 n.1, 656, P.2d 896 900 n.1 (Ct.App.1982)(Section 568a: television broadcast is libel, not slander); *Poorbaugh v. Mullen,* 99 N.M. 11, 20-21, 653 P.2d 511, 520-21, (Ct.App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982)(Sections 562, 564A, 577, 593, 594, 596, 599: group libel; privileges); *Marchiondo v. New Mexico State Tribune Co.,* 98 N.M. 282, 292-95, 648 P.2d 321, 332-34 (Ct.App.1981), *cert. quashed,* 98 N.M. 336, 648, P.2d 794 (1982)(Section 566: fair comment privilege); *Kutz v. Independent Publishing Co.,* 97 N.M. 243, 245-46, 638 P.2d 1088, 1091-93 (Ct.App. 1981), *cert. denied,* 97 N.M. 483, 641 P.2d 514 (1982) (Sections 566, 621: fair comment privilege; actual malice); *Dominguez v. Stone,* 97 N.M. 211, 213, 638 P.2d 423, 425 (Ct.App.1981)(Section 559: defamatory communications defined); *Ammerman,* 91 N.M. at 254, 572 P.2d at 1262 (Section 580A: actual malice).

The Restatement (Second) of Torts Section 611 generally extends a privilege to publishers of fair and accurate reports of judicial proceedings which contain defamatory matter; comment c, however, excepts from that privilege publishers who alone or collusively take the opportunity to introduce defamatory matter into such a proceeding and then to publish it to the general public. We believe that the Restatement (Second) of Torts Section 611 and comment c provide clear guidelines for the conduct of reporters and for the analysis of defamation claims from their reports.

More importantly, we believe that Restatement (Second) of Torts Section 611 and comment c properly balance the public and private interests implicated when defamatory statements are made in the course of judicial proceedings. The public's interest in receiving fair and accurate reports of such proceedings will be served; publishers acting only as reporters will not bear the burden of establishing the truthfulness of every courtroom accusation they report; those few publishers who both participate in the making of defamatory statements in court and the reporting of those proceedings may be liable for the harm resulting from their abuse of the situation; and the individuals harmed by the dissemination of defamatory matter abusively introduced may be enti-

tled to some measure of recovery against the wrongdoers. We therefore adopt Restatement (Second) of Torts Section 611 and comment c thereto as the law of New Mexico governing the privilege to report judicial proceedings in situations in which the publisher of the report may have participated in the making of the original defamatory statement in the course of the proceedings.

We note that the courts of several other jurisdictions likewise have adopted Restatement (Second) of Torts Section 611 after reviewing their own decisions, the opinions of the United States Supreme Court discussing the constitutional guarantees of freedom of speech and of the press, and the works of torts commentators. *See Green Acres Trust v. London,* 141 Ariz. 609, 618-19, 688 P.2d 617, 626-27 (1984) (en banc); *Read v. News-Journal Co.,* 474 A.2d 119, 120-21 (Del.1984); *Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 88-89 (D.C.App.1980), *cert. denied,* 451 U.S. 989 (1981); *O'Donnell v. Field Enterprises, Inc.,* 143 Ill.App.3d _____, _____, 96 Ill.Dec.752, _____, 491, N.E.2d 1212, 1215-16 (1986); *Shafer v. Lamar Publishing Co.,* 621 S.W.2d 709, 711-12 (Mo.App.1981); *Curran v. Philadelphia Newspapers, Inc.,* 497 Pa. 163, 182-83, 439 A.2d 652, 661 (1981); *see also Ricci v. Venture Magazine, Inc.,* 574 F.Supp. 1563, 1564, 1567-68 (D.Mass.1983)(relying on Section 611 and Massachusetts cases); *Kilgore v. Younger,* 30 Cal.3d 770, 776, 180 Cal.Rptr. 657, 660, 640 P.2d 793, 796 (1982)(en banc)(comparing Section 611 to Cal. Civ. Code Sections 47(4),(5) (West 1982)); *Mark v. Seattle Times,* 96 Wash.2d 473, 487, 635 P.2d 1081, 1089 (1981) (en banc), *cert. denied,* 457 U.S. 1124 (1982). We believe that these decisions represent the modern trend in defamation law and that, as the issue arises, these and other courts will join us in following Restatement (Second) of Torts Section 611 and comment c.

The Court of Appeals and the district court in the present case reached different conclusions as to whether, under Restatement (Second) of Torts Section 611 comment c, the *Journal* "made" the original defamatory publication itself when it filed Sternlieb's affidavit. We find it unnecessary to resolve this difference at this stage of the proceedings. Neither court below considered whether the fair report privilege in this situation was forfeited under the last sentence of comment c, which provides that the original publisher may not "confer the privilege upon a third person, even a member of the communications media, by making

the original statement under a collusive arrangement . . . for the purpose of conferring the privilege . . ."

The movants for summary judgment, the defendants here, bear the burden of showing the absence of a genuine issue of material fact or that they are entitled as a matter of law to a summary judgment in their favor. *Goodman v. Brock,* 83 N.M. 789, 793, 498 P.2d 676, 680 (1972). We have held that the fair report privilege is not absolute and that under the circumstances defendants are not entitled to summary judgment as a matter of law. The defendants' showing regarding the relationship between the Journal's agents and Sternlieb in the preparation and editing of the affidavit indicates that materials issues of fact remain under Restatement (Second) of Torts Section 611 comment c, and therefore we hold that defendants are not entitled to summary judgment.

Accordingly, we reverse the decision of the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HARRY E. STOWERS, JR.,
Chief Justice

WILLIAM RIORDAN, Justice

WILLIAM R. FEDERICI, Justice

DAN SOSA, JR., Senior Justice, Dissenting
MARY C. WALTERS, Justice, Dissenting

SOSA AND WALTERS, Justices (Dissenting).

We cannot concur because, although we have no disagreement with the law stated in the opinion, the trial court is to determine on remand whether there was collusion that would bring Section 611(c) of *Restatement (Second) of Torts* into operation. As Judge Bivins noted in his opinion:

> The record reflects that Sternlieb made substantially the same allegations to the Federal Bureau of Investigation more than a year before Donahue's alleged meeting with him. Moreover, Stover's original claim of conspiracy, based in part on allegations that defendants joined with Sternlieb to create the affidavit, was dismissed with prejudice.

We believe the issue addressed in the majority opinion has already been disposed of.

The opinion of the Court of Appeals shall be published as an Appendix to this dissent.

DAN SOSA, JR., Senior Justice

MARY C. WALTERS, Justice

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, January 28, 1987

NO. 16,191

BOB STOVER,

Petitioner,

vs.

JOURNAL PUBLISHING CO.,
ALBUQUERQUE PUBLISHING CO.
and THOMPSON H. LANG,

Respondents.

This matter coming on for consideration by the Court upon Motion for Rehearing, and the Court having entered an order on January 26, 1987, granting said motion for rehearing;

NOW, THEREFORE, IT IS ORDERED that the Opinion handed down by this Court on December 11, 1986 is hereby withdrawn;

IT IS FURTHER ORDERED that the Writ of Certiorari heretofore issued by this Court on January 16, 1986 is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 8503 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

_____

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Friday, June 26, 1987

NO. 16,191

BOB STOVER,

Petitioner,

vs.

JOURNAL PUBLISHING CO.,
et al.,

Respondents.

This matter coming on for consideration by the Court upon Motion for rehearing, and the Court having considered said Motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion for Rehearing is hereby denied.

ATTEST: A TRUE COPY

_____

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

NO. CV-84-02412

BOB STOVER,
Plaintiff,

vs.

JOURNAL PUBLISHING COMPANY
ALBUQUERQUE PUBLISHING
COMPANY, AND THOMPSON H. LANG,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT AND AUTHORIZING INTERLOCUTORY APPEAL ON DENIAL OF SUMMARY JUDGMENT

This matter having come on before the Court on Defendants' motion for summary judgment on the amended complaint for defamation, and the Court having considered the arguments of counsel, having reviewed the evidence and being fully advised herein,

1. The Defendants herein were also Defendants in *Marchiondo v. Brown, et al.*, Cause No. CV-6-75-02838, District Court, Second Judicial District, County of Bernalillo, State of New Mexico [hereafter the Marchiondo Case].

2. On January 12, 1982, an affidavit signed by Jerome Sternlieb was filed in the *Marchiondo* Case.

3. On April 14, 1982, an Albuquerque Journal article reported portions of Sternlieb's affidavit, and other statements.

4. For purposes of this motion only, the Court assumes that Paragraphs 8 and 9 of said affidavit are defamatory to the Plaintiff and Defendants had a high awareness of their probable falsity.

5. The filing of the affidavit was done in the course of a judicial proceeding, was reasonably related to the subject matter of that litigation, and is absolutely privileged.

6. Whether the April 14, 1982, Albuquerque Journal article is a fair and accurate report of the courtroom proceeding in the *Marchiondo* Case is a question of law.

7. The April 14, 1982, article fairly and accurately reported a judicial proceeding the *Marchiondo* Case.

8. The statements of Thompson H. Lang in the April 14 article and the placement of Plaintiff's photograph in relation to the headline, the article and the other photographs are not susceptible to a defamatory meaning and are protected statements of opinion.

9. The Defendants cannot invoke the fair report privilege since, according to comment (c) of Section 611 of the Restatement of Torts, "a person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he has stated."

Summary Judgment In Favor Of Defendants Regarding Filing Of The Sternlieb Affidavit On January 12, 1982

10. IT IS ORDERED, ADJUDGED AND DECREED that the affidavit was generated in the course of a judicial proceeding, was reasonably related to the subject matter of the *Marchiondo* case, and is absolutely privileged.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that summary judgment in favor of all defendants be and hereby is granted as to the filing of the Sternlieb affidavit.

Summary Judgment In Favor Of Defendants Regarding Statements Of Defendant Lang In The April 14, 1982 Albuquerque Journal Article

12. IT IS ORDERED, ADJUDGED AND DECREED that to the extent the first and second causes of action are based on statements by Defendant Lang in the newspaper article of April 14, 1982, or the placement of Plaintiff's photograph in relation to the headline, the article and the other photographs, these statements are not susceptible to a defamatory meaning, are constitutionally protected opinions and are not actionable.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that to the extent that the first and second causes of action are based on statements by Defendant Lang in the newspaper article of April 14, 1982, or the placement of Plaintiff's photograph in relation to the headline, the article and the other photographs, summary judgment in favor of the Defendants is hereby granted.

Denial Of Summary Judgment Regarding Reporting Of Sternlieb Affidavit In The April 14, 1982 Albuquerque Journal Article

14. IT IS ORDERED, ADJUDGED AND DECREED that with respect to the reporting of the Sternlieb affidavit in the article of April 14, 1982, the article was a fair and accurate account of the judicial proceeding which was reported, such being a question of law.

15. IT IS ORDERED, ADJUDGED AND DECREED that summary judgment is denied as to Defendants Lang, Journal Publishing Company and Albuquerque Publishing Company on the ground that the fair report privilege does not apply here due to comment (c) of Section 611, Restatement, Torts 2d.

Certification For Interlocutory Appeal And Stay Of Proceeding

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court finds that this order and decision involves a controlling question of law to which there is substantial ground for difference of opinion, that a definitive resolution of this question may be case dispositive, and that an immediate appeal from this order and decision may materially advance the ultimate determination of the litigation. The trial court estimates the length of trial of this case to be at least one month and pretrial discovery will be extremely costly and time-consuming for both parties. In the event the court is incorrect in its

determination with respect to the availability of the fair report privilege under the circumstances of this case, a definitive decision by the New Mexico appellate courts will entirely dispose of this case in light of the court's other rulings.

17. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as of March 1, 1985, all proceedings in this action, including all discovery, be and hereby is stayed pending an appeal to the proper appellate court.

_____

DISTRICT COURT JUDGE